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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-543

SECURITY TIRE & RUBBER COMPANY,
a Virginia Corporation,
Petitioner,

vs.

THE GATES RUBBER COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTRODUCTORY PARAGRAPH

The Petitioner, Security Tire & Rubber Company, a Virginia corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on the 12th day of July, 1979.

OPINIONS BELOW

There was no formal opinion of the District Court. The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals (Appendix page A1 infra) was entered on the 12th day of July, 1979. No petition for rehearing was filed. A Motion to Clarify Judgment was filed in the Court of Appeals by Respondent. This Motion was denied on August 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION RAISED

Petitioner (hereinafter called "Security") was a private brand vendor of tires, i.e. it purchased tires manufactured by others under the "Security" label for resale. During the relevant period, most of the tires which it thus purchased and resold were made for it by Respondent (hereinafter called "Gates"). Gates also marketed tires under the "Gates" label. It also made tires under the label "National" which were marketed by its wholly owned corporate subsidiary, National Tires, Inc. (hereinafter called "National"). In this suit, Security has alleged that at the relevant times it competed with National; that the tires manufactured by Gates for Security under the Security label and those manufactured for National under the National label were identical except for label; that the prices charged by Gates to National for National tires were less than those which it charged Security for identical tires made under the Security label; and that this price differential constituted price discrimination under the Robinson-Patman Act. The question presented here is whether the transactions in which the tires made by Gates under the National label were transferred to National constituted sales for the purposes of the Robinson-Patman Act.

STATUTORY PROVISION INVOLVED

Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act reads (in pertinent part) as follows:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce. . ."

STATEMENT

The District Court entered judgment for Security against Gates for treble damages on a jury verdict that Gates had discriminated in price between National and Security in the sale of tires to both. Since the question presented is whether the transactions in which Gates tires were transferred to National were sales within the meaning of the Robinson-Patman Act, the following summary of the evidence on the question of sales is necessary:

Gates and National were separate corporations. National was wholly-owned by Gates. Gates offered no explanation of its purpose in maintaining National as a separate corporation over many years. When a sale of National Tires was made to a tire dealer customer, the customer was invoiced on an invoice which purported to come from National. He received a bill that purported to come from National. His payment went into a bank account established under the name "National Tires, Inc." An invoice was prepared monthly which reflected sales by Gates to National. A monthly bill was prepared which reflected that Gates was billing National for National Tires sold

during the month. National was given a customer number by Gates similar in character to that given by Gates to Security. Gates' invoices and bills indicated that they related to "purchases" of tires by National. Accounting entries were maintained which reflected charges to National for National tires sold and credits to National for payments made when monies were withdrawn from the National bank account and paid over to Gates. The same sort of entries were made in connection with sales to Security. Though the employees who performed all of these functions and who handled the sale of National Tires were paid and furnished offices and facilities by Gates, charges were made on Gates' books to National for all of these functions. Though all of the directors of National were associated with Gates, most were not directors of Gates. Profit and loss statements were prepared with respect to the National operations. Balance sheets were prepared for it at the end of each year. Consolidated tax returns were filed on behalf of both corporations. A former officer of Gates testified that National tires were "sold" by Gates to National; that they were "transferred"; that by transfer, he meant that ownership of tires was transferred from Gates to National; and that Gates had a separate sales force. The testimony of the National sales manager rather clearly reflects that though he was furnished cost figures for National tires and given a total profit objective for the National operation, it was he who set the prices at which individual sizes and kinds of National tires would be sold in order to meet that objective, and that not he, but other persons, performed the pricing functions with respect to the other tires made by Gates. Stationery containing the letterhead "National Tires, Inc." and that containing the letterhead "Gates Rubber Company" showed different phone numbers and different addresses (or the same address stated differently). The National sales manager wrote

Security a letter under the letterhead of "National Tires, Inc." in which he stated that "Nashville", referring to the Nashville tire plant of Gates, is "required to wire and ask us (obviously referring to National) for the price of National tires shipped out of Nashville." A price list purporting to be published by National exhorted its customers to buy now because later "we will be paying higher prices to the Company" obviously meaning Gates. In a sworn response (later changed) to written interrogatories, Gates stated that some tire moulds were held in the name of National. In sworn answers to other interrogatories, also later changed, when asked what price National paid Gates for certain tires, Gates answered "T.P.C. (meaning Total Plant Cost) plus all actual expenses". In another sworn response to a written interrogatory which asked whether financial statements were prepared for National and that copies be furnished, Gates answered (its answer was later changed) with an objection that any such financial statements would not be relevant because "National Tires, Inc. manufactured belts and hoses as well as tires during the period of 1969 - 1973."

FEDERAL JURISDICTION

The basis for Federal jurisdiction in the first instance in this case is 15 U.S.C., Section 15.

REASONS FOR GRANTING WRIT OF CERTIORARI

This case involves the application of the Robinson-Patman Act to multiple distribution systems - i.e. to arrangements under which manufacturers distribute their products through independent distributors who buy the products for resale and also through their own corporate

subsidiaries, which sell in competition with the independents. Generally, a violation of the Act requires at least two sales - one to a favored customer and one to a disfavored customer. The question presented here is simply whether a sale by a manufacturer to its wholly-owned separate-corporation subsidiary can be a sale to a favored customer of which the disfavored independent can complain. This is a profoundly important question of federal law which has not been, but should be, settled by this Court.

In a nutshell, the Court of Appeals has held that:

(1) There is no sale when a manufacturer makes an interdepartmental transfer from its manufacturing department to its sales department as an incident to distribution of its own product;

(2) There is no difference, except of form, between such an interdepartmental transfer and a transfer from a manufacturer to its wholly-owned corporate subsidiary;

(3) In antitrust law, substance prevails over form;

(4) Therefore, a transfer from parent to corporate subsidiary is not a sale for purposes of the Robinson-Patman Act.

The converse of the foregoing analysis can be argued with equal logic and greater fidelity to the purpose of Robinson-Patman. That purpose, obviously, is to preserve competition by protecting the disfavored customer from destruction resulting from price discrimination in favor of a competitor. From the standpoint of the disfavored customer, it makes no difference whether the favored customer is independent of or a wholly-owned subsidiary of the common supplier. If the disfavored customer faces loss or destruction because it must compete against a party who

can buy commodities for resale more cheaply, its dilemma is the same, whatever the connection between the supplier and the favored customer. It makes no difference to Security that its favored competitor was National rather than an independent "beneficiary" (in the words of the Court of Appeals). The destructive result, from its standpoint, is exactly the same.

The foregoing analysis has been used to argue that even interdepartmental transfers are within the ambit of the Act. See *Reines Distribution v. Admiral Corp.*, 256 F.Supp. 581 (SDNY, 1966). This argument runs afoul of the canon of statutory construction that words are to be given their commonly understood meanings. The words "price", "purchaser" and "purchase" do not, as commonly used, connote transfers between different departments of a single corporate entity. Further, there is legislative history which indicates that Congress did not intend any such thing. See footnote 1 in *Reines*, above.

A transfer from parent to subsidiary corporation faces no such obstacle. It is hornbook law that the two are separate entities. There are literally hundreds of reported cases in nearly every field of law in which the concept of separate corporate entity has been decisive. One immediately thinks of questions of jurisdiction, venue, income tax, franchise tax, creditor's rights, torts, contracts, agency, bailment and employer's liability. In none of these fields is there any doubt that there can be a sale by a parent to a subsidiary. In view of the immense consequences accorded the concept of separate corporate entity in other fields of law, why should it be disregarded for purposes of Robinson-Patman? There is nothing in the Act to suggest that the words "purchase", "purchaser" and "price" were used as words of art or were intended to have other than their ordinary and usual meanings.

From this, it follows that the refusal by the Court of Appeals to characterize the transactions between Gates and National as sales under Robinson-Patman amounts to nothing less than a policy decision (whether or not consciously adopted) to limit the application of the Act in a way not warranted by its language.

Further, the opinion of the Court of Appeals raises more questions than it answers. If there can never be a sale from parent to 100% owned subsidiary, what of a 90% owned subsidiary? 50%? Subsidiary controlled in fact by ownership of less than 50%? Also, the Court's analysis differs from that found in other opinions which have discussed sales from parent to subsidiary and the closely related question of whether sales by parent and subsidiary are sales by the same seller, so that there is discrimination if the sales are at different prices. (The Court of Appeals' opinion cites almost all of the cases known to counsel directly involving these questions.) In one opinion, parent and subsidiary are said to be separate if they hold themselves out as being separate or if the parent does not control the subsidiary's pricing. In others, the control factor alone is treated as critical. None explain how a wholly-owned subsidiary can fail to be subject to the control of the parent. Only this case holds that there can never be a sale from parent to subsidiary.

Given the importance of Robinson-Patman to the commercial life of the country, this is a case in which writ of certiorari should be granted by the Court under the criteria announced by this Court in its Rule 19(1)(b).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

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PROOF OF SERVICE

I, David B. Kultgen, one of the attorneys for Security Tire & Rubber Company, a Virginia corporation, Petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 10th day of September, 1979, I served copies of the foregoing petition for writ of certiorari on the Gates Rubber Company, Respondent, by mailing three (3) copies in a duly addressed and certified envelope with first class postage paid to its attorney of record, Louis P. Bickel, Bickel and Case, 5441 First International Building, Dallas, Texas 75270.

It is further certified that all parties required to be served have been served.

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APPENDIX

APPENDIX A

SECURITY TIRE & RUBBER COMPANY, a Texas Corporation, and Security Tire & Rubber Company, a Virginia Corporation, Plaintiffs-Appellees,

v.

The GATES RUBBER COMPANY, a Colorado Corporation, Defendant-Appellant.

The GATES RUBBER COMPANY, a Colorado Corporation, Plaintiff-Appellant,

v.

SECURITY TIRE & RUBBER COMPANY, a Texas Corporation, and Security Tire & Rubber Company, a Virginia Corporation, Defendants-Appellees.

No. 77-1943

United States Court of Appeals, Fifth Circuit.

July 12, 1979.

Plaintiffs, private brand sellers of tires, brought action on claim of Robinson-Patman Act price discrimination, among others, against defendant tire manufacturer; defendant brought action on account, and the causes were consolidated. The United States District Court for the Western District of Texas, Jack Roberts, J., entered single judgment under both cause numbers in favor of plaintiffs and defendant, and appeals were taken. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) a tire manufacturer's transfers of tires to its wholly owned sales sub-

sidiary could not be considered separate sales to a favorite customer as basis for a Robinson-Patman Act price discrimination claim, and (2) transfers from a parent corporation to its wholly owned subsidiary corporation can never be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit.

Reversed in part; affirmed in part; and remanded.

1. Trade Regulation (Key) 914

A tire manufacturer's transfers of tires to its wholly owned sales subsidiary could not be considered separate sales to a favorite customer as basis for a Robinson-Patman Act price discrimination claim. Robinson-Patman Price Discrimination Act, § 2(a), 15 U.S.C.A. § 13(a).

2. Trade Regulation (Key) 914

Transfers from a parent corporation to its wholly owned subsidiary corporation can never be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit. Robinson-Patman Price Discrimination Act, § 2(a), 15 U.S.C.A. § 13(a).

3. Trade Regulation (Key) 914

Intracorporate transfers and transfers between parent and a wholly owned subsidiary are not the type of transactions the Robinson-Patman Act meant to regulate. Robinson-Patman Price Discrimination Act, § 2(a), 15 U.S.C.A. § 13(a).

Appeals from the United States District Court for the Western District of Texas.

Before SIMPSON, TJOFLAT and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

This is primarily a price discrimination case brought under Section 2(a) of the Robinson-Patman Act. 15 U.S.C.A. § 13. We hold that Plaintiffs have failed to allege or prove a discriminatory sale to be a favored customer.

I.

The factual background and the course of proceedings relevant to our decision today may be briefly summarized.

In 1964, Plaintiffs, Security Tire & Rubber Company, a Texas Corporation (Security-Texas), and Security Tire & Rubber Company, a Virginia Corporation (Security-Virginia), embarked on a course of dealing with the Defendant, The Gates Rubber Company, a Colorado Corporation (Gates). This course of dealing eventually led to the present litigation.

Defendant Gates is in the rubber manufacturing business. Gates' product line included tires for motor vehicles until the Fall of 1973, when it sold its Nashville, Tennessee tire manufacturing facility to Armstrong Rubber Company. Gates completely ceased tire manufacturing by the Spring of 1974. Plaintiffs, Security-Texas and Security-Virginia were "private brand" sellers of tires, although Security-Texas was not actively selling tires after early 1970. A "private brand" is a line of tires produced for a customer with a brand name, imprinted on the tires, which is owned by and identified with that customer. The Plaintiffs commenced in their venture in 1964, and from then until the Fall of 1973 they purchased most of their tires from Gates. The Plaintiffs marketed tires under the label of "Security" and did business predominantly in the Southeast United States.

At the outset, the parties operated under a verbal understanding. Subsequently, they reduced certain terms of their dealing to a written contract on July 17, 1969. The written contract did not set the prices of the tires to be manufactured by Gates and bought by Plaintiffs, nor did it require Plaintiffs to purchase any given number of tires. It merely provided that Plaintiffs were to purchase eighty percent of their requirements from Gates, if Gates produced the type of tire required by Plaintiffs. The written contract also provided for cancellation by any party upon one-hundred and eighty days notice.

During the period relevant to this lawsuit, 1969-73, there also existed a wholly-owned subsidiary of Gates, National Tires, Inc. (National). In effect, Gates marketed tires under the National label.

The somewhat complicated procedural history of this suit begins on February 8, 1974, when Plaintiffs, Security-Texas and Security-Virginia, instituted a lawsuit in the Western District of Texas against Defendant Gates, filed as No. W-74-CA-9. The complaint alleged several different causes of action, including a treble damage action under the Robinson-Patman Act alleging a secondary line discrimination, a claim for a breach of warranty for an alleged failure to manufacture tires properly and a claim for a breach of contract for Gates' alleged failure to give timely notice of the cancellation of the July 17, 1969, contract. The complaint also alleged, and thus admitted, that Plaintiffs were indebted to Gates for tires and demanded that the debt be offset against their damages and that recovery be allowed for damages in excess of the debt. On February 22, 1974, Gates instituted a suit on an account against Security-Virginia in the Chancery Court of Davidson County, Tennessee which was removed to the federal court for the Middle District of Tennessee. By court order, Gates' action was transferred from the Middle District of Tennessee to the Western District of Texas on June 4, 1974, and it was assigned No. W-74-CA-41. The answer in No. W-74-CA-41 incorporated the complaint filed in No. W-74-CA-9 and demanded an offset of damages against the debt owed Gates. The Plaintiffs' cause, No. W-74-CA-9, and Gates' cause, No. W-74-CA-41, were consolidated for purposes of pretrial proceedings and trial.

By way of an Amended Complaint in No. W-74-CA-9, which was filed on January 18, 1977, the Plaintiffs abandoned all but three of their claims. The claims contained in the Amended Complaint and tried in the District Court were: (1) the Robinson-Patman treble damage claim; (2) the breach of contract claim for the alleged failure of Gates to manufacture tires in accordance with the warranty and standards of the Federal Department of Transportation; and (3) the breach of contract claim for the alleged failure of Gates to provide Plaintiffs with six months notice of cancellation of the July 17, 1969 contract. Gates' claim on the account against Security-Virginia was asserted in No. W-74-CA-41 and also as a counterclaim in No. W-74-CA-9, but was tried as a companion or consolidated case along with No. W-74-CA-9.

Both of the above cases were tried to a jury commencing on March 8, 1977. Gates' claim on the account against Security-Virginia, No. W-74-CA-41, was not submitted to the jury inasmuch as Security-Virginia admitted the account and stipulated that Gates had proven all the elements of its claim on the account. Upon Gates' motion, the District Court entered a judgment on the account. Plaintiffs' claims, No. W-74-CA-9, were submitted to the jury on a general charge, and the jury rendered a general verdict. The jury found for the Plaintiffs on the antitrust claim in the amount of $100,000 and for the Plaintiffs

on the claim of breach of contract for failure to give timely notice on the cancellation of the contract in the amount of $3,667. The jury rendered a general verdict for Gates on the Plaintiffs' claim for breach of warranty.

On March 23, 1977, the District Court entered a single judgment under both cause numbers. The judgment awarded the Plaintiffs the sum of $303,667, representing the $100,000 on the antitrust claim trebled plus $3,667 on the breach of contract claim for failure to give notice of cancellation. The judgment also awarded Plaintiffs their costs and attorneys' fees, with the proviso that the amount of attorneys' fees would be determined at the conclusion of any appeal which might be taken from the judgment or at such time as the judgment became final. The judgment further awarded Gates $458,235.69, together with interest at the legal rate until paid, on the account against Security-Virginia. The judgment failed to award Gates prejudgment interest, attorneys' fees or costs. An amended judgment was entered on April 20, 1977, which deleted Security-Texas as a prevailing party in No. W-74-CA-9, pursuant to a postjudgment motion made by Gates. However, the amended judgment failed to make any disposition of Security-Texas. To that end, a second amended judgment was entered on May 27, 1977, which provided that Security-Texas take nothing for its causes of action.

II.

Section 2(a), in pertinent part, reads: "It shall be unlawful for any person . . . to discriminate in price between *different purchasers* of commodities . . . where *such commodities are sold* for use, consumption, or resale within the United States." 15 U.S.C.A. § 13(a) (emphasis supplied). Courts have interpreted the Section 2(a) language to require that a plaintiff establish two separate and con-

temporaneous sales transactions made by the same seller to two distinct purchasers. "[N]o single sale can violate the Robinson-Patman Act." *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755, 67 S.Ct. 1015, 1021, 91 L.Ed. 1219 (1947). Besides being suggested by the very language of the statute, the requirement of two transactions is implicit in the purpose of the Robinson-Patman Act. Anti-competitive price discrimination among competing buyers is the evil the statute prohibits. For price discrimination to occur, it is axiomatic that one purchaser must pay more than another purchaser; there must be two or more transactions at different prices. *See generally Areeda, Antitrust Analysis* ¶¶ 701-740 (2d ed. 1974); *Kitner, A Robinson Patman Primer* 77-78 (1970); *Rowe, Price Discrimination under the Robinson Patman Act* (1964); *Sullivan, Antitrust* §§ 217-19, 222-25 (1977); *Von Kalinowski, Antitrust Laws & Trade Regulations* § 24.03 (1975). *See also generally, e. g., Hampton v. Graff Vending Co.*, 516 F.2d 100, 102 (5th Cir. 1975); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 208 (5th Cir. 1969); *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4, 7 (5th Cir.), *cert. denied*, 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969); *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962).

The theory and proof of Plaintiffs' case assigned National the role of their competitor and the beneficiary of Gates' price discrimination—the so-called "favored customer." Plaintiffs sought to assign themselves the roles of the victims of Gates' price discrimination—the so-called "disfavored customers." It is important to note that National, the wholly-owned subsidiary of Gates, was the only customer of Gates alleged to have been favored; there was neither any further allegation nor proof of any other beneficiary of Gates' alleged price discrimination.

[1, 2] Assuming *arguendo* that Plaintiffs established the other prerequisites for a recovery, their theory and proof would support the jury's verdict only if the transfers of tires from Gates to its wholly-owned subsidiary, National, were considered sales within the meaning of the Robinson-Patman Act. Today, we reject what little authority we have found supporting the theory that under some circumstances a parent corporation's transfers to its wholly-owned subsidiary may be considered separate sales to a favored customer in a Robinson-Patman Act price discrimination suit. Briefly, we shall explore the history of this theory and explain why we are not persuaded to follow in its future. Ours is a different course. We hold that transfers from a parent corporation to its wholly-owned subsidiary corporation can never be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit.

The origins of the theory we reject today lie in *Danko v. Shell Oil Co.*, 115 F.Supp. 886 (E.D.N.Y. 1953). In *Danko* the operator of a gasoline retail station sued a gasoline distributor and alleged, "the defendant directly or indirectly owns, operates, maintains and controls a gas station within one mile of plaintiff's station and *grants itself preferential treatment and discriminates against the plaintiff.*" *Id.* at 888 (emphasis added). Thus, the plaintiff in *Danko* alleged, *inter alia*, that it was the disfavored customer and sought to compare its purchases from the defendant with sales from the defendant to the defendant's wholly-owned retail gasoline stations to establish a price discrimination. The District Court denied the defendant's motion to dismiss for failure to state a claim on which relief could be granted without providing any economic, antitrust analysis and without citing any significant controlling precedent:

> The fact that defendant itself may own and control such filling station would not destroy the relationship of vendor and purchaser. In any event, it is doubtful that such relationship, if discriminatory, would be permitted to accomplish such objective. See for analogy, *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598, 71 S.Ct. 971, 95 L.Ed. 1199, and cases cited therein. That the Court actually looks behind form to see who the real competitors are, see *American Cooperative Serum Ass'n v. Anchor Serum Co.*, 7 Cir., 153 F.2d 907, 913, 914. Surely, all of these unresolved factual questions, coupled with the statement in *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 755, 67 S.Ct. 1015, 91 L.Ed. 1219, with respect to what types of sales are actually discriminatory, constrain the Court to overrule the objection to the third cause of action.

Id. With the offhand observation, "The fact that defendant itself may own and control such filling station would not destroy the relationship of vendor and purchaser," the District Court, seemingly unwittingly, created antitrust theory. At least, the District Court declined to dismiss the complaint which it understood to depend upon such a theory.

The apparent basis of this theory is found in the general postulate of antitrust law that substance and true competitive function control rather than corporate form. By analogy, the District Court relied on *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951) which involved the rather remote question whether a partially-owned subsidiary corporation could conspire with its parent corporation in violation of the Sherman Act. *See also Perkins v. Standard Oil Co.*,

395 U.S. 642, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215, 71 S.Ct. 259, 95 L.Ed. 219 (1951). The validity of this antitrust postulate is beyond peradventure, and with it we have no quarrel. There usually is no substitute for a careful analysis of the economic realities presented by the facts of a given case in light of the underlying purpose of the relevant antitrust statute. We simply refuse to follow the *Danko* analogy here. At the same time, we do not seek to exalt form over substance. Instead, we are convinced that substance may be coincident with form and that this is such a situation. If there be a form versus substance issue here, we are quite convinced that our antitrust analysis more properly emphasizes substance over form than the theory we reject today.

Although several courts have noted the theory first suggested in *Danko*, we have found no reported decision in which a Robinson-Patman Act damage award was actually sustained on the basis of the theory.[1] We decline to be the first, for we are left unpersuaded by the mere repetition of all this encysted *obiter dictum*.[2]

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1. *Parrish v. Cox*, 586 F.2d 9, 11-12 (6th Cir. 1978); *Brown v. Hansen*, 556 F.2d 969 (9th Cir. 1977); *Brewer v. Uniroyal, Inc.*, 498 F.2d 973, 977 n.2 (6th Cir. 1974); *Mowery v. Standard Oil Co.*, 463 F.Supp. 762, 775-776 n.17 (N.D.Ohio 1976); *Schaben v. Samuel Moore and Co.*, 462 F.Supp. 1321, 1330 (S.D.Iowa 1978); *Diehl & Sons, Inc. v. International Harvester Company*, 426 F.Supp. 110, 123 (E.D.N.Y. 1976); *Snyder v. Howard Johnson's Motor Lodges, Inc.*, 413 F.Supp. 724, 730-31 (S.D.Ill. 1976); *Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 272 F.Supp. 915, 919 (D.Haw. 1967); *Reines Distributors, Inc. v. Admiral Corporation*, 241 F.Supp. 814, 815, 256 F.Supp. 581, 585-86, 257 F.Supp. 619, 621 (S.D.N.Y. 1965). The unofficially reported decision in *Mississippi Petroleum Inc. v. Vermont Gas Systems, Inc.*, 1972 Trade Cases ¶ 73,843 (S.D.Miss. 1972) is not to the contrary.

2. Long ago, Mr. Justice Holmes once lamented: "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde v. United States*, 225 U.S. 347, 391, 32 S.Ct. 793, 811, 56 L.Ed. 1114 (1912) (Holmes, J., dissenting).

Here, we deem it sensible to treat parent corporation and wholly-owned subsidiary corporation as a single economic unit. *See Areeda, Antitrust Analysis* ¶ 701 n.12 (2d ed. 1974). There are other situations in which the single economic unit approach is applied which we find much more relevant to the issue at hand than the *Danko* analogy. If there is an affirmative showing that the parent actively controls a wholly-owned sales subsidiary, then the subsidiary's sales are attributable to the parent. Thus, a plaintiff might establish a Robinson-Patman Act violation if the evidence shows a price discrimination between a customer of the parent corporation and a customer of the wholly-owned subsidiary. The subsidiary and parent are treated as the same seller. The identical analysis is applied to determine whether a remote purchaser-plaintiff is an indirect purchaser from a seller which is involved in its customer's dealings with the plaintiff. *See generally Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969); *Baim & Blank, Inc. v. Philco Corp.*, 148 F.Supp. 541 (E.D.N.Y. 1966). *See also generally Von Kalinowski, Antitrust Laws & Trade Regulations* § 24.04 [2], [3] (1975). These theories, which are neither invoked nor involved here, highlight the theoretical flaw in the *Danko* approach. In the application of both the same seller doctrine and the independent purchaser doctrine, the parent and wholly-owned subsidiary are treated as a single economic unit. Thus, sales from the same economic unit to the favored customer and to the disfavored customer are compared to determine whether there has been a price discrimination. The requirement of two sales is satisfied. The *Danko* theory lacks this requirement. Under *Danko*, a sale from the parent corporation to the plaintiff is alleged as the disfavored sale. However, there is no sale to a favored customer for comparison and thus

no price discrimination may be shown. Transfers from a parent corporation to its wholly-owned subsidiary corporation are transfers within the same economic unit. These transfers are the economic equivalent of intra-company transfers of goods. As such, these transfers cannot be considered sales for Robinson-Patman Act purposes. *See generally* authorites cited in note 1, *supra*. *See also generally Von Kalinowski, Antitrust Laws & Trade Regulation* § 24.03[2] (1975).

[3] The Robinson-Patman Act separates out and makes illegal competitively harmful discrimination. Intracorporate transfers and transfers between parent and wholly-owned subsidiary are not the type of transactions the Robinson-Patman Act meant to regulate. The realistic effect on competition should control rather than esoteric and theoretical possibilities under the *Danko* theory couched in terms of "control" and "arm's length dealings." Realistically, the competition here was between Gates and National as a single economic unit, on the one hand, and Plaintiffs, on the other hand. Internal transfers between Gates and National were of no real competitive consequence. There is nothing in this record to suggest that disregarding the separate corporate entities will enable Gates and National to circumvent the Robinson-Patman Act. *See generally Brown v. Hansen Publications*, 556 F.2d 969, 972 (9th Cir. 1977); *Brewer v. Uniroyal, Inc.*, 448 F.2d 972, 977 n.2 (6th Cir. 1974); *Mowery v. Standard Oil Co.*, 463 F.Supp. 762, 775-76 n.17 (N.D.Ohio 1976); *Diehl & Sons, Inc. v. International Harvester Co.*, 426 F.Supp. 110, 123 (E.D.N.Y. 1976); *Snyder v. Howard Johnson's Motor Lodges, Inc.*, 412 F.Supp. 724, 731 (S.D.Ill. 1976). In this manner underlying substance controls surface form in economic and antitrust importance. In form, Gates sought to raise a corporate veil between its manu-

facturing and sales efforts by conducting its own retail operations through a separate corporate entity. There being no other owner of National besides Gates, the substance of this marketing technique was simply that a single economic unit manufactured and marketed its product. Therefore, we hold that a parent corporation's transfers to its wholly-owned subsidiary may not be considered separate sales to a favored customer in a Robinson-Patman Act price discrimination suit. Since National was the only customer of Gates alleged to have been favored and since there was neither any further allegation nor proof of any other beneficiary of Gates' alleged discrimination, Plaintiffs have failed to establish the requisite favored sale for a Robinson-Patman Act suit.[3]

III.

The remaining issues Gates raises need not long detain us. First, we are not persuaded by Gates' efforts to upset the breach of contract recovery. Second, we do not believe that the District Court abused its discretion in deny-

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3. Pragmatically our rejection or acceptance of the *Danko* theory would not change the fate of Plaintiffs' appeal. Even under the theory we reject, the separateness of parent and wholly-owned subsidiary must be established in order for a transfer between them to be considered a favored sale. There must be some showing of a lack of control by the parent and arm's length dealings between parent and subsidiary. *See* authorities cited note 1, *supra*. The Plaintiffs here depend on little else but the apperances of independence incident to Gates' and National's separate corporate status. Gates exercised full dominion and control over National; there was no arm's length dealings between them. Thus, on this record we would reverse even under the *Danko* theory had we found the theory itself persuasive. *See Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (appellate standard for review of jury verdict).

Those who suffer real antitrust damage are not necessarily left without any antitrust remedy either under our own analysis or under an unsuccessful attempt to recover on the *Danko* theory we reject. *See, e. g., Schaben v. Samuel Moore and Company*, 462 F.Supp. 1321, 1332 (S.D.Iowa 1973); *Reines Distributors, Inc. v. Admiral Corp.*, 256 F.Supp. 581, 586 (S.D.N.Y. 1966).

ing Gates prejudgment interest in No. W-74-CA-41. Third, given our reversal of the Robinson-Patman Act claim, we deem it appropriate to remand for a reassessment of the issue of costs before the District Court in No. W-74-CA-41; costs on this appeal are awarded to Gates as the prevailing party. Fourth, we find no error in the District Court's failure to award Gates attorneys' fees in No. W-74-CA-41. Finally, we reject Gates' claim that it was entitled, as a matter of right, to two separate judgments here.

IV.

In summary, in No. W-74-CA-9, the Robinson-Patman Act claim is reversed, the breach of contract claim is affirmed; in No. W-74-CA-41 we affirm except we remand for reassessment of the issue of costs before the District Court.

REVERSED in part; AFFIRMED in part; and REMANDED.